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IN THE

Supreme Court of the United States

..... TERM, 196—

No. 1024

EMILIO PIZZARELLO,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction entered by the United States District Court for the Southern District of New York, Marvin E. Frankel, J., after a jury trial for violations of 26 U.S.C. §§ 4401, 4411, 4412, 7203, 7262 and 7272.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and is reprinted in the appendix hereto (A. 1a). The opinions of the District Court on petitioner's motion to suppress and on petitioner's motion for reargument are unreported and are reprinted in the appendix hereto (5a-12a).

Jurisdiction

The judgment of conviction was entered in the District Court on May 10, 1966. The judgment of the Court of Appeals was entered on November 17, 1967. By order dated December 4, 1967, Mr. Justice Harlan granted an extension of time within which to petition for certiorari to January 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the federal wagering tax statutes are unconstitutional as violating the Fifth Amendment privilege against self-incrimination.

2. Whether an uninvited entry by a federal agent of Petitioner's office-storage room after opening a closed door without a warrant or notice of his authority and purpose was illegal, and rendered illegal the observations then made and an arrest, search, seizure and statemen tof Petitioner based on said observations.

Constitutional Provisions Involved

United States Constitution

Amendment [*IV.*]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment [*V.*]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

18 U.S.C. § 3109. Breaking doors or windows for entry or exit.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The federal wagering tax statutes (26 U.S.C. §§ 4401, 4411, 4412, 7203, 7262 and 7272 are set forth in the appendix hereto (13a-15a).

Statement

In the Spring of 1965, Petitioner was the full time proprietor of a stationery store-luncheonette at 151 West Sanford Boulevard, Mt. Vernon, New York (97, 123, 411-12, Exhibit 6). It was divided into an area where business was done with the general public and a back room which served as a storeroom and Petitioner's office. The room contained his desk, cases of soda and food, a safe, a table, a wardrobe and a refrigerator. It was concededly not a part of the store where business was transacted with the general public (406-08, 411-13, 426-27, 439-43, 709-11, Exhibits A-N; opinion of Court below). Between March

30, 1965 and April 14, 1965, inclusive, a federal agent named Ripa made horse wagers with Petitioner on seven occasions in the office-storeroom in the back of the store. On these occasions he also saw others leave wagers with Petitioner (12-41), always between approximately 1:00 P.M. and 2:00 P.M. (71). Prior to Ripa's seventh visit on April 14, he recounted his experiences and described what he had observed to another agent named Riley. On April 14, Riley also observed Ripa enter the office-storeroom from the public portion of the store (400-08).*

On April 15, 1965, Ripa again left a wager with Petitioner in the back of the store and reported that fact to Riley outside the store at about 1:25 P.M. Ten minutes later Riley and other agents entered the store armed with a void arrest warrant (5a-12a) and Riley observed one unknown man go through the door to the back room (408-12).* At this point, though they had neither a valid arrest nor information that a felony was being committed (428-30), Riley and the other agents went behind the counters in the store, opened closed doors without knocking and entered the back room where Riley immediately arrested Emilio Pizzarello for a violation of the federal wagering tax laws as a misdemeanor (401, 413, 425-36, 5a-12a, 676-80, 737-38, Exhibits A-N). Riley had never placed a bet with Petitioner nor seen one placed (425). When he entered, he observed Mr. Pizzarello seated next to the desk talking to another man who was seated nearby (412-13). Two other men were standing in the room, one holding a scratch sheet and the other a newspaper open to the horse racing section. On the desk were

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*The decision of the Court of Appeals incorrectly states that "Riley observed agent Ripa and *several* others enter the backroom on the afternoon of April 15th" a few minutes before Riley entered and arrested petitioner. As the record shows, Riley only saw *one* person enter the office-storeroom on April 15 before Riley entered and Riley had seen Ripa enter on April 14, not April 15.

four National Programs, a few 3 x 5 white blank slips of paper and a few pencils (84-85, 412-13).

After the arrest, Petitioner was searched and the agents took $425, ten horse bet slips and a "payoff slip" (Exhibits 27-37, 413, 86, 156). At approximately 3:00 P.M., some agents removed Emilio Pizzarello from the premises (98) and took him to Manhattan where a stenographic statement was taken at 4:25 P.M. (291-93, 131, Exhibit 6). Thereafter, Petitioner was taken before the United States Commissioner and released on bail.

On August 19, 1965, an Information was filed charging petitioner with having wilfully failed to pay the special tax of $50 while engaged in the business of accepting wagers (count one) and having wilfully failed to register with Internal Revenue while engaged in the same business (count two). The charges alleged violation of 26 U.S.C. §§ 4401, 4411, 7203, and 7262 in count one and 26 U.S.C. §§ 4401, 4411, 4412, 7203 and 7272 in count two.

After a hearing on a motion to suppress in the trial court, Judge Thomas F. Murphy held that the warrant pursuant to which Petitioner had been arrested was invalid, but that the arrest was lawful on the theory that the arresting officer saw enough upon his uninvited entry into the office-storage room to give him adequate grounds for believing that a misdemeanor was being committed in his presence. The court overruled the contention that Riley had illegally entered the back room and denied the motion to suppress insofar as it related to the evidence taken at the time of the arrest as well as the statement taken three hours later (5a-12a).

A separate hearing was held to determine the admissibility of the statement. Petitioner again urged improper entry and illegal arrest as tainting the statement (698-836). Judge Marvin E. Frankel held that the statement was admissible (834-35), however, and it was also

received on the trial (132, Exhibit 6) along with the card, slips and some cash. The trial commenced on March 2, 1966 and concluded on March 5, 1966. The jury found appellant guilty of the two charges with a stipulation of non-wilfulness and judgment was entered on May 10, 1966.

Reasons for Granting the Writ as to the Contention that the Wagering Tax Statutes are Unconstitutional

The writ should be granted as to the contention that the federal wagering tax statutes are unconstitutional as violating the privilege against self-incrimination of the Fifth Amendment to the United States Constitution since this Court has recently granted writs of certiorari on this question on several previous occasions and has not rendered a decision in those cases. See, *e.g. Marchetti* v. *United States* and *Grosso* v. *United States*, 36 U.S.L. Week 3177 (October 31, 1967).

Reasons for Granting the Writ as to the Contention that the Entry of the Office-Storage Room and the Arrest were Illegal

1. This Court has repeatedly held that evidence obtained by means of a trespass and other invasions of privacy may not be used as a basis for a lawful arrest. See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963); *Silverman* v. *United States*, 365 U.S. 505 (1961); *Katz* v. *United States*, U.S. Sup. Ct., Dec. 18, 1967. It is thus crucial to the adjudication of cases arising under the Fourth Amendment and to the supervision of federal agents engaged in law enforcement that trespass and invasion of privacy be clearly defined and the tests therefor clearly delineated.

In the instant case, the Court of Appeals neither formulated a test nor applied the correct test to determine if a trespass had occurred. That test is whether one person

has made an unauthorized entry on the property of another. An unlawful intent is not necesasry. *MacDonald* v. *Parama, Inc.*, 15 A.D. 2d 797, 224 N.Y.S.2d 854 (2d Dep't 1962); *Semble Silverman* v. *United States, supra.* Again, a trespasser is defined as "a person who enters upon the premises of another without invitation, express or implied, and does so out of curiosity or for his own purpose or convenience and not in the performance of any duty to the owner." *Mendez* v. *Goroff*, 25 M. 2d 1013, 203 N.Y.S.2d 568, 571 (Sup. Ct. 1960), *aff'd*, 13 A.D.2d 705, 214 N.Y.S.2d 580 (2d Dep't 1961).

In the instant case, there was, of course, no express invitation to Agent Riley by Petitioner to enter the room. They had never met. Nor was there an implied invitation insofar as Riley embodied one of the general public. The room was not and could not be open to the general public since it housed activity contrary to both New York and Federal Law. That the office-storeroom, tucked away behind the counters was not open to the general public and that a sign would have been superfluous was also evident by a mere glance at photographic exhibits A-N. By any view, it is clear that, like the Petitioner in the *Katz* case, *supra*, Petitioner intended his conduct in the room to be concealed from the public and the Government so conceded on the trial (321-321a). As a result, the Court of Appeals had to concede that the room was not open to the public at large, stating that ". . . this room was not 'public' to the same degree as the luncheonette."

Insofar as the invitees necessarily were a class more limited than the general public, the most probable common denominator was the ability to pass a screening test of some sort. See, *e.g.*, *People* v. *Lawery*, 43 M. 2d 1084, 252 N.Y.S.2d 823 (Crim. Ct. 1964). At the very least, all of the class would be willing to place wagers. But whatever the limitations and qualifications of the invitees, it is clear that Agent Riley, who went there for the exclusive purpose of arresting Petitioner, was not included and seeing one invitee precede him into the room could not alter the fact.

The only way in which that concededly limited group of invitees could have been defined in a way large enough to include Agent Riley would have been to defy the principal of contradiction and erroneously define it as unlimited, *i.e.*, including "any person who had the inclination to enter." The Court of Appeals did so, misapplied the law of trespass, and contravened this Court's decisions in the *Katz*, *Wong Sun* and *Silverman* cases, *supra*.

2. It is settled that a peace officer, whether he arrests by virtue of a warrant or by virtue of his authority to arrest without a warrant, may not "break open" a door in a house unless admittance has been refused after notice of his authority and purpose for demanding admission. *Miller* v. *United States*, 357 U.S. 301 (1958); 18 U.S.C. § 3109.

In the court below, it was not disputed that the arresting officer failed to comply with the rule before entering the room where he arrested Petitioner or that the room constituted part of a "house" within the meaning of Section 3109. Neither was it questioned that evidence seized after an entry that offends the statute must be suppressed. Rather, the Government correctly urged that the law in the Second Circuit is that Section 3109 only requires the announcement of authority and purpose when entry is made forcibly and that the words "break open" in the statute do not apply to a "peaceable" (though unauthorized) entry, of the kind made by Agent Riley. *United States* v. *Conti*, 361 F.2d 153, 157 (2d Cir. 1966); *United States* v. *Garnes*, 258 F.2d 530, 533 (2d Cir.), *cert. denied*, 359 U.S. 957 (1958). This construction of the statute is not only in conflict with the traditional common law definition of "breaking" as any unauthorized opening, but also conflicts with decisions of the Court of Appeals for the District of Columbia, the Ninth Circuit and the Fourth Circuit which have held that even peaceful entry is forbidden unless it is by consent. See *Keiningham* v. *United States*, 287 F.2d

126 (D.C. Cir. 1960); *Hair* v. *United States*, 289 F.2d 894 (D.C. Cir. 1960); *United States* v. *Mullin*, 329 F.2d 295 (4th Cir. 1964); *Munoz* v. *United States*, 325 F.2d 23 (9th Cir. 1963). See also, *United States* v. *Sims*, 231 F. Supp. 251 (D. Md. 1964); *United States* v. *Poppitt*, 227 F. Supp. 73 (D. Del. 1964).

The decision of the Court of Appeals in the instant case does not make specific reference to the contention that Agent Riley's entry violated Section 3109, but as indicated by the last paragraph, the point was considered on the merits. This Court should accept jurisdiction on this point both because of the inherent importance of the question in the administration of the Federal criminal laws and in order to resolve the conflict between the various Courts of Appeals.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

January 11, 1968.

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